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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. .

MARGARET C. DONOVAN,

Petitioner,

—against—

QUEENSBORO CORPORATION, GARDEN HOUSING CORPORATION, THE TERMINAL HEIGHTS CORPORATION, QUEENSBORO INVESTING COMPANY, A. EDWARD MACDOUGALL, HENRY S. LOCKWOOD, A. EDWARD MACDOUGALL, as Executor of the Last Will and Testament of Edward A. MacDougall, Deceased,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

JURISDICTIONAL STATEMENT.

The jurisdiction of this Honorable Court is invoked under Section 240(a) and Section 262 of the Judicial Code, as amended (28 U. S. C., Sections 347(a) and 377 respectively), and Supreme Court Rule XXXVIII, par. 5(b) and Rule XXXIX.

In conformity with the calendar practice of this Court, a separate formal motion for leave to file a petition for a writ of certiorari, pursuant to Judicial Code, Section 262, is being filed simultaneously herewith for docketing on the Miscellaneous Calendar. It is respectfully re-

quested that this petition and said motion be brought on for argument at the same time, and all statements contained herein and in the brief in support hereof, are, to the extent applicable, referable as well to said motion under Judicial Code, Section 262, and are urged in support of the granting of said motion.

Summary Statement.

Petitioner, Margaret C. Donovan, the plaintiff-appellant below, by her counsel, prays that a writ of certiorari, pursuant to Judicial Code Section 240(a), or, in the alternative, pursuant to Judicial Code Section 262, issue to review an order (R. 23) of the Circuit Court of Appeals for the Second Circuit, rendered March 23rd, 1948, in an action entitled Margaret C. Donovan, plaintiff, against Queensboro Corporation, et al., defendants. Said order granted defendants' motion to dismiss—for lack of jurisdiction—plaintiff's appeal to that Court. Plaintiff had appealed from such portion of an order (R. 9) dated November 24, 1947, of the District Court of the United States for the Eastern District of New York, as granted defendants' motion to require plaintiff, pursuant to the provisions of Sections 61-b and 64 of the General Corporation Law of the State of New York (Appendix to Petitioner's Brief, pp. 37-40) to give to the defendant, Garden Housing Corporation, security satisfactory to the District Court in the sum of $50,000 for defendant's expenses, including attorneys' fees, and staying all further proceedings by plaintiff pending deposit of the $50,000 security (R. 11). Said appeal—dismissed by the aforesaid order of the Circuit Court—also included an appeal from an order (R. 11) of said District Court, made and entered December 19, 1947, denying plaintiff's motion to modify the said order of the District Court dated November 24, 1947, so as to provide therein for the dismissal of the complaint should the required $50,000 security not be deposited within a stated time. The writ

is also asked for the purpose of reviewing the order of the said Circuit Court, made and entered on April 16th, 1948 (R. 35), denying plaintiff's petition for rehearing.

Statement of Facts.

This is an action in equity by the plaintiff as holder of a Voting Trust Certificate representing 111½ shares of stock of the defendant Garden Housing Corporation of the par value of $11,150, or approximately 2.35% of the 4,730 shares of stock of said corporation issued and outstanding. The suit was instituted in the United States District Court, for the Eastern District of New York. While it is a stockholder's derivative action for an accounting and recovery against officers and directors of said corporation for waste, mismanagement, and unlawful sale of corporate assets of the defendant Garden Housing Corporation, the primary relief requested is sought against Queensboro Corporation as the wrongful recipient and beneficiary of certain assets of said Garden Housing Corporation, so allegedly wasted, mismanaged and misappropriated, by the individual defendants, due, as alleged, to the domination and control by the Queensboro Corporation of the said Garden Housing Corporation and its officers and directors (R. 24). Plaintiff's cause of action alleges that the Queensboro Corporation, its officers and affiliated corporations, owned or controlled, directly or indirectly, approximately 87% of the stock of Garden Housing Corporation (R. 25).

The defendants, before answer, moved in the District Court to dismiss the amended complaint on the ground that diversity of citizenship had been collusively obtained and that the plaintiff was not the real party in interest, which motion was denied and no appeal was taken therefrom (R. 10), so that no issue of diversity is here involved, and it has been determined that the plaintiff has fulfilled the necessary jurisdictional requirements for bringing suit in the District Court.

However, on said motion, the defendants also moved in the alternative to require the plaintiff, pursuant to the provisions of Sections 61-b and 64 of the General Corporation Law of the State of New York, to give to the defendant, Garden Housing Corporation, security in the amount of $50,000, for reasonable expenses, including attorneys' fees, which might be incurred by it and by the other parties defendant for which said Garden Housing Corporation might become subject, and that, pending the deposit of such security, all further proceedings on the part of the plaintiff, be stayed.

The order of the District Court, by the Honorable Judge Inch, dated November 24th, 1947, granted the said alternative relief, ordering security for expenses and counsel fees in the sum of $50,000 and staying all proceedings on plaintiff's part, except for review, modification or vacation of the order, pending deposit of the $50,000 security (R. 11).

The plaintiff having urged, by affidavit filed in the District Court in opposition to said motion (R. 20), that she was not able to furnish any security other than the ordinary security for costs of $250.00, and her attorneys, being mindful of the customary practice to include in orders staying proceedings until the deposit of security, a proviso for the dismissal of the complaint if the security requirement should not be complied with within a limited time, moved to modify the said order of Judge Inch accordingly (R. 20). The motion requested modification of the order so as to provide that unless such security was furnished by a fixed date, then the action should be dismissed. Such a provision would have furnished, in so many words of the order and of record, a finality which could not be disputed to question plaintiff's right to appeal to the Circuit Court. Said motion to modify was denied by order (R. 11-12) of the District Court made and entered December 19th, 1947.

The plaintiff, through counsel upon oral argument in the District Court, by briefs submitted by her counsel

therein, by affidavit in the District Court (R. 26) and by reassertion in the Circuit Court, and in the petition for rehearing (R. 18, 26, 27, 28), protested her complete inability to meet the extraordinary security requirements, and asserted her right to access to the federal court without imposition of prohibitive and discriminatory barriers erected by state law which she claimed to be in violation of the "due process of law" and "equal protection of laws" clauses of the United States Constitution.

The plaintiff also showed in her verified complaint, referred to in her petition for rehearing (R. 25), the practical impossibility of securing 5% of the stock of the defendant corporation in view of the fact that the defendant Queensboro Corporation, its officers and affiliated corporations, alone owned or controlled, directly or indirectly, approximately 87% of the stock of Garden Housing Corporation, and it appeared by an affidavit of defendants' counsel (R. 25-26) that—apart from the plaintiff,—the holders of all but five shares of the corporation's stock (approximately 1/10th of 1%), were either defendants or so under the domination and control of the defendants, that they had approved and ratified the wasteful and unlawful sale of corporate assets, thus making it impossible for the plaintiff to meet the 5% requirement of Section 61-b of the General Corporation Law.

Plaintiff, by notice of appeal dated December 22nd, 1947 (R. 13), appealed to the Circuit Court of Appeals, for the Second Circuit, from so much of the aforesaid orders of the District Court as required the giving of $50,000 security and stayed further proceedings on the part of the plaintiff and as denied the aforesaid motion of the plaintiff for modification of the first such order of Judge Inch.

The defendants moved to dismiss the appeal on the ground that the orders appealed from were not final decisions and therefore not appealable, and that an appeal to the Circuit Court to review said orders was unauthorized by law (R. 1). The Circuit Court of Appeals, with-

out opinion, granted defendants' motion and dismissed the appealed by order dated March 23rd, 1948 (R. 23).

The plaintiff thereupon petitioned said Circuit Court for a rehearing (R. 24). Said petition also requested the Circuit Court to certify to the Supreme Court for its instructions under Judicial Code, Section 239 (28 U. S. C. 346 and Rule XXXVII of this Court), four questions relating to the finality, appealability and constitutional validity of the District Court orders (R. 29-30). Said petition (R. 24-35) was denied, without opinion, by order dated the 16th day of April, 1948 (R. 35).

Questions Presented.

1. Whether a state statute (Sections 61-b and 64 of the General Corporation Law of New York), requiring the plaintiff in a stockholder's derivative action, if holding less than 5% of the outstanding shares of any class of such corporation's stock or if holding less than $50,000 in market value thereof, to give security for reasonable expenses, including attorneys' fees, at the instance of the corporation involved, as a condition precedent to proceeding with such suit, must be given effect in a federal court where the jurisdiction of the federal court is based upon diversity of citizenship.

2. Whether such state statute may be given effect in such case in a federal court within the discretion of such court.

3. Whether, even assuming an affirmative answer to either or both of the foregoing questions, the District Court did not abuse its discretion in requiring the security of $50,000 in circumstances

(a) where it is impossible for the plaintiff to secure the joinder, as parties plaintiff, of the holders of 5% of any class of the stock of said corporation;

(b) where the financial resources of the plaintiff render the giving of such security impossible; and

(c) where the primary recovery sought is against a party defendant not entitled, under Section 64 of said statute, to assessment of expenses, being neither a director, officer or employee of the corporation for whose benefit the suit was instituted.

4. Whether said Sections 61-b and 64 of the General Corporation Law of New York, inherently and as applied herein, are not in violation of the "due process of law" and "equal protection of the laws" clauses of Section 1, of Amendment XIV of the Constitution of the United States.

5. Whether the stay by the District Court of all proceedings on the part of the plaintiff, pending the giving of $50,000 security, was not,—in view of the prohibitive amount imposed and the sworn inability of the plaintiff to meet such requirement,—such an effectual and conclusive termination of plaintiff's right to proceed with her cause of action, that said order was, in fact and in law, a final decision, requiring review by the Circuit Court pursuant to Section 128 of the Judicial Code, or, in substance and effect, an injunction requiring review by the Circuit Court pursuant to Section 129 of the Judicial Code.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Reason I. The District Court orders, and the refusal of the Circuit Court to review the same, represent a decision on important questions of federal law which have not been but should be decided by this Court, namely,

(a) the applicability of Sections 61-b and 64 of the General Corporation Law of New York to suits in the federal courts based on diversity of citizenship;

(b) the constitutionality of said state statute, both inherently and as applied in this action, measured against the "due process" and "equal protection" guarantees of the United States Constitution.

Reason II. The Circuit Court of Appeals, by its refusal to entertain the appeal herein, has so far departed from the applicable decisions of this Court, and has sanctioned such a departure therefrom by the District Court, as to warrant the intervention of this Court, in that

(a) access to the federal courts has been denied to a citizen by reason of lack of financial resources to comply with drastic requirements imposed by the Court as a condition precedent to presenting her suit;

(b) the decisions of this Court interpreting the appealability to the Circuit Court of Appeals of orders of the District Court (Judicial Code, Sec. 128) and the right to appeal from injunctions (Judicial Code 129) have not been given effect;

(c) the refusal to modify the order requiring security so as to provide in the alternative for dismissal of the complaint (which would constitute beyond question a final decision) is in conflict with established practice and tends to abridge and circumvent the statutes authorizing appeals from the district courts.

Reason III. There is a compelling necessity for a definitive restatement by this Court, and demarcation of the limits of the doctrine of *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, in order

(a) to assure uniformity of application throughout the federal district and appellate court system in the United States;

(b) to prevent the engrafting of state legislative policies on the procedural jurisprudence of the federal courts;

(c) to give effect to the constitutional authority of the United States Congress alone to legislate with respect to the exercise of the judicial power in courts of the United States, and the authority of this Court to supervise and regulate the practice and procedure of inferior federal tribunals.

Reason IV. The public interest will be promoted by prompt settlement in this Court of the questions involved.

The New York statute involved, applies, by its terms, not only to domestic New York corporations, but also foreign corporations. Thus, as the world center of corporate finance and corporate activity, it affects thousands upon thousands of corporate investors throughout the United States and billions of dollars invested by the American public.

The exculpatory effect of the statute, as a practical protection from judicial scrutiny of the acts of corporate management—good or bad—has encouraged the adoption of similar and even more drastic legislation in other states, particularly in those which compete with each other for revenues from corporate franchises.

The present and continuing spread of such legislation, if unchecked, would eventually require substitution of government agencies as the sole guardians of the investing public. The Securities and Exchange Commission, as presently constituted,—even if authorized by Congress—would be unable to cope with a situation under which the great bulk of the investing public would be required to by-pass the courts for enforcement of their rights by administrative agencies.

It is not only the basic economic and social problems, raised by such legislation, which necessitate prompt settlement in the public interest. Of equal importance is the urgent need for a consistent and uniform treatment of such statutes in the federal courts. It will be shown that the various federal courts have interpreted this and similar statutes in every possibly diverse way—as appli-

cable in federal suits and as not applicable; as mandatory and as discretionary. Such confusion of judicial decision among the federal judges requires an authoritative determination in the interest of certainty and consistency of federal jurisprudence.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals of the Second Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record of the proceedings of the said Circuit Court had in the case numbered 21000, and entitled on its docket, Margaret C. Donovan, Plaintiff-Appellant, against Queensboro Corporation, Garden Housing Corporation, The Terminal Heights Corporation, Queensboro Investing Company, A. Edward MacDougall, Henry S. Lockwood, A. Edward MacDougall, as Executor of the Last Will and Testament of Edward A. MacDougall, Deceased, to the end that this cause may be reviewed both under the aforesaid Section 240-a and Section 262 of the Judicial Code and the rules of this Court as aforesaid, and determined by this Court as provided for by the statutes of the United States; and that the order herein of the said Circuit Court of Appeals refusing to hear the petitioner's appeal from the District Court be reversed by the Court; and that, in accordance with the doctrine and practice of *In the Matter of 620 Church Street Building Corp.*, 299 U. S. 24, this Court reverse the order of the Circuit Court of Appeals and reverse the order of the District Court from which the petitioner's appeal was sought to be taken; and for such further relief as to this Court may seem proper.

Dated, New York City, N. Y., July 12, 1948.

MARGARET C. DONOVAN,
Petitioner,
By EDWARD F. CLARK,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1948.

No. .

MARGARET C. DONOVAN,

Petitioner,

—against—

QUEENSBORO CORPORATION, GARDEN HOUSING CORPORATION, THE TERMINAL HEIGHTS CORPORATION, QUEENSBORO INVESTING COMPANY, A. EDWARD MACDOUGALL, HENRY S. LOCKWOOD, A. EDWARD MACDOUGALL, as Executor of the Last Will and Testament of Edward A. MacDougall, Deceased,

Respondents.

BRIEF FOR PETITIONER.

Opinions Below.

The opinion of the District Court, dated November 17, 1947, is officially reported at 75 F. Supp. 131 and is printed in this record (R. 4-9).

The Circuit Court of Appeals, in dismissing the appeal and denying the petition for rehearing, rendered no opinion.

Basis for Jurisdiction.

Statement showing the grounds upon which jurisdiction of this Court is invoked is set forth at pages 5, 6 of the foregoing petition, and is, by reference, adopted as part of this brief.

Statutes Involved.

The statute directly involved is Sections 61-b and 64 of the General Corporation Law of the State of New York, and is printed as Appendix hereto (pp. 37 to 40 hereof). Also printed in said Appendix are Sections 20 and 21 of the Stock Corporation Law of the State of New York.

The sections of the United States Constitution involved herein are Amendment XIV, Section 1, Amendment V, and Article III, Sections 1 and 2 which constitutional provisions are printed in Appendix hereto (pp. 43, 44).

Statement.

The material facts are set forth in the summary statement and statement of facts at pages 2 to 6 inclusive of the preceding petition, and such statement is, by reference, adopted as part of this brief.

Argument.

POINT I.

The District Court orders herein and the refusal of the Circuit Court to review the same constitute a decision on important questions of federal law which have not been but should be decided by this Court.

Neither the constitutionality nor the applicability of this statute in the federal courts has been presented to or decided by the United States Supreme Court. The only case known to counsel in which this statute was submitted to this Court for consideration is *The Aspinook Corporation* v. *Bright,* 92 L. Ed., p. 579 (No. 569), 92 L. Ed., p. 580 (No. 347), in which this Court de-

nied certiorari. In that case a stockholder's derivative action had been instituted in the United States District Court, for the Southern District of New York. The defendant, Aspinook Corporation, moved in that court before the late Judge Bright for security in the sum of $90,000 under Sections 61-b and 64 of the New York General Corporation Law. Judge Bright denied the motion without opinion, *sub nom. Thompson* v. *Broadfoot*, 165 F. (2nd) 744, having previously held in *Boyd* v. *Bell*, 64 F. Supp. 22, that the statute was procedural and could not affect the right of the federal district court to proceed in an action where diversity of citizenship had been established. Petitioner, Aspinook, appealed to the Circuit Court of Appeals, Second Circuit, for a writ of mandamus to Judge Bright directing him to vacate the order. The Circuit Court of Appeals denied the petition (165 F. (2nd) 294), two of the Judges holding that the case was not one for application of the extraordinary remedy of mandamus, and one holding that the petition should be denied on the merits by reason of the fact that the state statute was procedural so far as the federal courts are concerned, and that, therefore, there was no obligation to apply it in the federal courts. The Aspinook Corporation petitioned this Court for certiorari pursuant to Judicial Code Section 240 (a) and for a writ of mandamus pursuant to Judicial Code Section 262. The petitions were denied by this Court (92 L. Ed. 579, 92 L. Ed. 580).

The denial by this Court of certiorari in the *Aspinook* case is understandable without minimizing the importance of the question here involved, namely, the constitutionality and application of Section 61-b of the General Corporation Law. In the *Aspinook Corporation* case the District Court had denied the petitioner's application for security. Accordingly, there was no stay of the proceedings and the case could proceed to trial, and the final determination, after trial, would be subject to appellate review by the Circuit Court of Appeals. In view of the fact that the

defendant corporation was the petitioner in the *Aspinook Corporation* case, the important question of public interest would not be so directly presented for review by this Court as in the instant case where the complaining stockholder, who has been in effect denied the right to be heard in the federal court, is the petitioner.

Moreover not only has there been no determination of the important question here involved by this Court, but also the New York State Court of Appeals has made no decision on the constitutionality of Section 61-b. The case of *Shielcrawt* v. *Moffett*, 294 N. Y. 180, had been urged by respondents' counsel below as a determination by the Court of Appeals of the validity of Section 61-b. In that case the Court of Appeals held that the statute was not intended to apply in actions pending at the time that the statute took effect and was careful to point out that it was not passing upon the question of constitutionality of the statute as applied to actions commenced after it became effective. At page 188 of its opinion, the Court said:

> "The Appellate Division granted leave to appeal, certifying to us thirteen questions of law. As the dissenting judges of the Appellate Division point out in their opinion, if the statute is not intended to apply in actions pending at the time that the statute took effect, the *court will not reach the question whether the statute is valid when applied to actions instituted thereafter.*" (Emphasis ours.)

And at page 191:

> "*We conclude that the Legislature has not disclosed an intention that the statute should apply in actions pending when it went into effect. We consider no other question.*" (Emphasis ours.)

The one case commenced after the effective date of Section 61-b which squarely presented the question of con-

stitutionality and in which leave to appeal to the Court of Appeals from the three to two decision of the Appellate Division was allowed, has never been pressed to the Court of Appeals *Baker* v. *MacFadden Publications, Inc.*, 270 App. Div. 440.

The need for such a determination is so urgent that it has been recognized by those who have written upon the subject,

> "• • • owing to the importance of the statute, the issue of constitutionality will be presented repeatedly to the New York courts or to the federal courts sitting in New York until there is a conclusive decision by the Supreme Court of the United States" *Constitutionality of Section 61-b* 54 Yale Law Journal, 352, 357 (1945).

POINT II.

The Circuit Court of Appeals, by its refusal to entertain the appeal herein, has so far departed from the applicable decisions of this Court and has sanctioned such a departure therefrom by the District Court, as to warrant the intervention of this Court.

A. Petitioner has been denied her "day in court" solely by application of a state statute which makes personal wealth a requisite to access to the courts.

The plaintiff showed in the lower Court (R. 17, 20) her complete lack of financial resources sufficient to comply with the security asked by defendants and imposed by the Court, and the impossibility of meeting the alternative requirements of enlisting 5% of the stockholders as parties plaintiff (R. 25-26).

It has always been the rule in derivative actions that a plaintiff need not request a corporation, its officers or directors, to bring an action for waste and mismanagement, when the relief is sought against the persons dominating and controlling the affairs of the corporation.

This is a rule of common sense founded on the premise that the law will not require a futile effort, the success of which is foredoomed. It is more irrational and arbitrary to condition a right to litigate upon the fulfillment of a physically and mathematically impossible joinder of 5% of stockholders as parties plaintiff. In the present case all but one-tenth of 1% of shares, other than plaintiff's, were owned or controlled by parties defendant or persons who had approved and ratified the wrongful acts of the defendants (R. 25-26).

No amount of legal citations or circuitous reasoning can alter the fact that plaintiff—so long as the decision in this case stands—is precluded by lack of money (amounting to a moderate fortune) from having her cause of action heard and determined by the courts.

Under our system of justice, this Court has never sanctioned a practice whereunder possession of wealth has been the price of admission to the federal courts.

In *Gulf, Colorado and Santa Fe Ry.* v. *Ellis*, 165 U. S. 150, 155, this Court said concerning a Texas statute

> "The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification."

In *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 318, this Court, in the opinion of Chief Justice Hughes, pointed out that the right of a plaintiff to be heard in a stockholder's action in the federal courts is not dependent upon the size of his holdings:

> "While their stockholdings are small, they have a real interest and there is no question but that the

> suit was brought in good faith. If otherwise entitled, they should not be denied the relief which would be accorded to one who owned more shares."

In *Life & Casualty Insurance Co.* v. *McCray,* 291 U. S. 566, this Court refused to hold invalid a state statute relating to allowance of costs and counsel fees to a policyholder bringing suit against an insurance company which had refused to pay a just claim. Six per cent. interest, and costs including a $200 award for counsel fees, had been approved by the state's highest court. In finding such statute to be reasonable and non-discriminatory, Mr. Justice Cardozo, however, stated certain criteria for validity which the New York statute in this case clearly fails to meet. He said, at page 574:

> "It is all 'a question of more or less'. *Sexton* v. *Kessler & Co.,* 225 U. S. 90, 98. The price of error may be so heavy as to erect an unfair barrier against the endeavor of an honest litigant to obtain the judgment of a court. In that event, the Constitution intervenes and keeps the court room open."

It is submitted that the District Court and the Circuit Court of Appeals in the instant case, have completely failed to adhere to the principles established in the foregoing decisions of this Court.

Upon the submission to the District Court of plaintiff's affidavit of inability to furnish anything but nominal security, there was also submitted the affidavit of one of plaintiff's counsel setting out his beneficial interest therein, legal title having been vested in plaintiff (R. 22) since December 1, 1942, nearly 4½ years before the commencement of this action (R. 6). Defendants, upon their motion in the Circuit Court of Appeals for the dismissal of the appeal, having failed to bring up any of the papers from the Court below except the opinion and order, the affidavit of the plaintiff showing inability to furnish security (R. 20-21) and the affidavit above referred to

(R. 22) were submitted to the Circuit Court of Appeals as a part of plaintiff's opposing affidavit. It is submitted that the fact that the plaintiff is the holder of the legal title only, does not deprive her of her right to set up her inability to provide the security. As to any owner, legal or equitable, the imposition of the $50,000 security and the staying of all proceedings, was a final order dismissing the complaint in reality though not in form, because the requirement of any security was completely unauthorized under the federal rules and procedure and was in violation of petitioner's constitutional rights to have her case heard and decided without complying with such alien requirements.

B. The decisions of this Court, interpreting the appealability of orders of the District Court and the right of appeal from injunctions, have not been given effect.

The petitioner's appeal to the Circuit Court was dismissed because the order appealed from was not considered a final decision within the meaning of Judicial Code, Section 128. In view of the conclusive effect of the order in forever barring any practical possibility of plaintiff's proceeding with her cause, it is clear that the Court did not give effect to the decisions of this Court making substance, rather than form, the basis of finality. Thus in *Cobbledick* v. *United States*, 309 U. S. 323, wherein the District Court denied a motion to quash subpoenas, and from the denial of said motions petitioner's appeal to the Circuit Court had been dismissed for lack of jurisdiction, this Court, after granting certiorari, said at page 328 (referring to the decision of this Court in *Perlman* v. *United States*, 247 U. S. 7):

> "To have denied him opportunity for review on the theory that the district court's order was interlocutory would have made the doctrine of finality a means of denying Perlman any appellate review of his con-

> stitutional claim. Due regard for efficiency in litigation must not be carried so far as to deny all opportunity for the appeal contemplated by the statutes."

So also in *Ettelson* v. *Metropolitan Life Insurance Co.*, 317 U. S. 188, at page 191, this Court stated:

> "As in the *Enelow* case, so here, the result of the District Court's order is the postponement of trial of the jury action based upon the policies; and it may, in practical effect, terminate that action."

Similarly in the instant case, it is a matter of record (R. 17, 19, 28) that the effect of the imposition of the $50,000 security requirement is a practical and effective termination of the law suit without opportunity on plaintiff's part to have been heard on the merits of her case.

While there seems to be no doubt that, in view of the conclusive practical effect of the District Court order, such order should have been held appealable under Judicial Code, Section 128, there was also ample authority for the Circuit Court of Appeals to entertain the appeal under the provisions of Judicial Code, Section 129. It is the contention of the petitioner that the permanent stay contained in the District Court order constitutes an injunction appealable under Judicial Code, Section 129. This Court has so determined in the case of *Enelow* v. *New York Life Insurance Co.*, 293 U. S. 379.

Thereafter, in *Ettelson* v. *Metropolitan Life Insurance Co.*, 317 U. S. 188, substantially the same question had arisen, except that the prosecution of the action had been enjoined by the District Court in order that an issue raised by a counterclaim might be first heard and disposed of. Also since the date of the *Enelow* case *supra*, the Federal Rules of Civil Procedure had been adopted. An appeal to the Circuit Court from the Dis-

trict Court order was taken and the Circuit Court certified to this Court certain questions for determination. The decision of this Court by Mr. Justice Roberts, said (pp. 191-192):

> "The parties agree that, if the question had arisen prior to the adoption of the Rules of Civil Procedure, our decision in *Enelow* v. *New York Life Ins. Co.*, 293 U. S. 379, would require an affirmative answer to the question.
>
> The defendant's contention, in brief, is that whereas, when the *Enelow* case was decided, the distinction between actions at law and suits in equity in federal courts still persisted, this distinction has now been abolished; that equitable defenses, whether a bar to plaintiffs' recovery at law or the basis of affirmative relief against the plaintiffs, are part and parcel of the single action initiated by the plaintiffs and that any direction by the court respecting the order in which the claim and the counterclaim are to be heard is interlocutory, amounting, at most, to a stay of the trial of one branch of the litigation, and in no sense an injunction against the plaintiffs. We cannot agree."

It is submitted that the Circuit Court, in failing to hear the appeal under authority contained in Section 129 of the Judicial Code, has departed from the principles established by this Court in the foregoing cases.

C. The refusal of the District Court to modify the order requiring security so as to provide in the alternative for the dismissal of the complaint, is in conflict with the established judicial practice and tends to abridge and circumvent the statutes authorizing appeals from the District Courts.

If the order had been modified as requested by petitioner so as to provide a time limit within which the security should be deposited or the appeal dismissed, then upon the failure to deposit within such time, the

finality of the order would have been beyond dispute on the question of plaintiff's right to appeal to the Circuit Court of Appeals. However, this reasonable modification of the order was refused. Judge Inch's opinion denying plaintiff's motion to modify, indicates that he had signed the form of order submitted by the plaintiff as he "felt she could object to the amount of security fixed by me". He then stated "Anything else, such as a new motion to dismiss must wait a motion by defendant if and when made" (R. 3).

This, of course, does not afford any sufficient reason for refusing the requested modification. The statement of Judge Inch—following the filing with him of an affidavit by petitioner (plaintiff) of inability to furnish any security other than the usual maximum security for costs in the sum of $250 (R. 20-21)—that he expected an application for reduction of the amount of security appears to be an afterthought, as his opinion issued upon the granting of the motion for the exact amount of security sought by the defendants expressly stated his finding, that the said sum of $50,000 was "not excessive or unreasonable".

POINT III.

The application by the lower courts of the doctrine of *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, in support of the enforcement of Section 61-b and similar statutes in the federal courts, requires a determination by this Court of the extent to which such rule shall affect procedural and eligibility requirements in the federal courts.

In the instant case the District Court, in its opinion, relied in large part upon statements made in the opinion of this Court in *Angel* v. *Bullington*, 330 U. S. 183, and respondents in their briefs similarly relied upon the decision of this Court in *Guaranty Trust Company of New York* v. *York*, 326 U. S. 99 as cases holding, respectively,

for application of the doctrine to state statutes regulating deficiency judgments and state statutes of limitations. From the decision below there would seem to be a tendency on the part of the District Court, with the full acquiescence of the Circuit Court of Appeals, to extend the doctrine of *Erie R. R. Co.* v. *Tompkins* beyond the applicable limits defined by this Court. There is nothing, however, in that case or in *Angel* v. *Bullington*, or in *Guaranty Trust Company* v. *York* (*supra*) which would authorize the District Court to apply procedural state statutes which would in effect deny right of access to the federal courts.

It is submitted that the doctrine of the *Erie Railroad* case and cases following it, have not abrogated the rule laid down in *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491, wherein it was stated:

> "A remedial right to proceed in a federal court sitting in equity cannot be enlarged by a state statute. Neither can it be so narrowed."

Certainly neither the decision of this Court in *Angel* v. *Bullington* or *Guaranty Trust Company* v. *York* (*supra*), can be said to support the action taken by the lower court in this case. In *Angel* v. *Bullington* the state statute provided certain machinery for the enforcement of a claim on a deficiency judgment, seeking by such legislation to prevent the inequitable situation where there might otherwise be two recoveries for the same indebtedness. The United States courts may logically be said to be bound by such state legislation, upon which the *existence* of a litigant's claim depends. If by application of the state law there was no valid claim to be enforced, obviously a claim could not be created merely by proceeding in the federal court. Similarly, in *Guaranty Trust Company* v. *York* (*supra*), the essential holding of this Court is to the effect that the time for the enforce-

ment of the claim having expired by state law, such state law should not be ignored in the federal court for the purpose of *reviving or recreating the expired claim.*

In addition, the line of cases headed by *Sioux County* v. *National Surety Co.*, 276 U. S. 238, relied upon by respondents, are in no way determinative of the question here involved. In that case a Nebraska statute was under consideration which required the allowance of an attorney's fee in case of judgment against the Surety Company on a bond written by it. The application of such a state statute in the federal court is clearly distinguishable as a substantive right rather than a procedural right afforded under state law. In other words, the Nebraska statute related only to the *amount* which the plaintiff might claim and recover by judgment. It did not affect the rights of the litigant of access to, or to be heard in, the federal court.

Under Article III, Sections 1 and 2 of the United States Constitution, the judicial power of the United States, including cases based upon diversity of citzenship, is vested in the Supreme Court and such inferior courts as Congress may establish. The encroachment upon the federal judicial power by such a state statute as here under consideration, is evident, since the practical effect of its application is to deny a litigant by said rules a right to be heard in the federal court. Authoritative decisions of this Court stand for the proposition that no such requirement can be allowed to affect the proceedings or procedure of the United States courts. Thus in *Missouri Pacific Ry. Co.* v. *Larabee*, 234 U. S. 459, at page 470, it was said:

> "The question is then, was the court below right in holding that it had the power because the Kansas statute so authorized to assess as against one party to a suit in the Supreme Court of the United States

a sum for attorneys' fees for services rendered in that court as against another party to the suit although such assessment, as we have seen, was not authorized by the law of the United States but was in conflict with the settled rule in the Supreme Court of the United States? It seems superfluous to put the question since its very statement conveys of necessity a negative answer. For how on the face of the question, consistently with the most elementary principles of our constitutional system of government can it be possibly assumed that a state statute could be made operative in the Supreme Court of the United States to the disregard of its settled rule of procedure and of the principles which had guided its conduct from the beginning, directly sustained by express rule adopted under the sanction of Congress?"

And again in *Harrison, Secretary of State of Oklahoma* v. *St. Louis & San Francisco Railroad Company,* 232 U. S. 318, at page 328 it was said:

"It may not be doubted that the judicial power of the United States as created by the Constitution and provided for by Congress pursuant to its constitutional authority, is a power wholly independent of state action and which therefore the several States may not by any exertion of authority in any form, directly or indirectly, destroy, abridge, limit or render inefficacious. The doctrine is so elementary as to require no citation of authority to sustain it. Indeed, it stands out so plainly as one of the essential and fundamental conceptions upon which our constitutional system rests and the lines which define it are so broad and so obvious that, unlike some of the other powers delegated by the Constitution, where the lines of distinction are less clearly defined, the attempts to transgress or forget them have been so infrequent as to call for few occasions for their statement and application."

And yet we find—despite the care which this Court has taken in defining the limits of the doctrine of *Erie R. R. Co.* v. *Tompkins* and in stating the principles covering the judicial power of the United States and the exclusive right of this Court to regulate and make rules of procedure for the federal courts—that the federal district court has adopted in this case rules of procedure not authorized by rules of this Court or any laws of the United States but admittedly rules of local or state origin.

In his opinion District Court Judge Inch specifically referred to the rule adopted by the judges of the Federal District Court as follows (R. 8):

> "Moreover, Rule 45 of this Federal District Court provides that, 'whenever a procedural question arises which is not covered by the provision of any statute of the United States or of the Federal Rules of Civil Procedure * * * the procedure which shall then prevail in the Supreme Court of the State of New York shall be applied.'"

This, we submit, is at best a dangerous practice, and if followed throughout the numerous federal districts, would result in the very confusion in federal practice, the avoidance of which was sought by adoption by this Court of the Federal Rules of Civil Procedure.

In fact, the District Court herein not only applied local state rules of procedure, but ignored Rule 23 of the Federal Rules of Civil Procedure, which Rule, particularly subdivision (c) thereof, eliminates in the federal court the claimed evil—secret settlements—to meet which Section 61-b of the New York General Corporation Law was avowedly enacted. See "The American Investor and the Constitutionality of Section 61-B of the New York General Corporation Law," 54 Yale Law Journal, p. 367, footnote 62, referring to the Memorandum of Governor Thomas E. Dewey. (See also reference to Governor's

Memorandum on approving 61-b, quoted at 22 McKinney's Consolidated Laws of New York, General Corporation Law, Section 61-b; 1947 Cumulative Supplement at page 70.) Rule 23(c) prohibits a dismissal or compromise of a class action without the approval of the Court and requires that notice of any proposed dismissal or compromise be given to all members of the class (here stockholders) in such manner as the Court may direct. This rule thus effectively meets the problem of so-called "strike suits" by banning secret settlements.

POINT IV.

The public interest will be promoted by prompt settlement in this case of the questions involved.

In order properly to comprehend the tremendous significance of this and similar statutes upon the thousands of corporate investors in the United States and upon the regulation of corporate management, it is necessary to make some reference to the factual background and circumstances under which this legislation was enacted. In a thorough analysis by Sergei S. Zlinkoff of the statute, appearing in 54 Yale Law Journal, 352, entitled "The American Investor and the Constitutionality of Section 61-b of the New York General Corporation Law", the author summarized the factual background surrounding the enactment of this statute, saying, at page 359:

> "Section 61-b did not originate with the Law Revision Commission or the Judicial Council of the State of New York, and, indeed, their opinion was not even requested. Nor was the statute one proposed by any bar association. Admittedly it is identical, except in one respect, with one recommended by the New York Chamber of Commerce, and it was introduced in the state legislature simultaneously with the public release of the Chamber's proposed act and Report of

its Special Committee on Corporate Litigation, dealing with stockholder suits and issued after a privately conducted study of more than a year.

No hearings of any character were conducted by the legislature, and it was hurriedly passed in the closing days of the legislative session with the scantiest of debate. Every bar group that had an opportunity to express an opinion about the Act before its signature by the Governor, including the Committee on State Legislation of the New York County Lawyers Association, the Federal Bar Association of New York, New Jersey and Connecticut, and the Law Reform Committee of the New York City Chapter of the National Lawyers Guild, condemned the statute as undesirable. Strong objection to the legislation was made by the non-partisan Citizens Union of New York City and by the American Investors Union, a non-profit organization devoted to the protection of the interests of the American investor, and both the AFL and CIO issued statements expressing disapproval. Many of these groups joined numerous individuals in requesting the legislature and the governor of New York to hold hearings before enacting the measure into law, but none was held.

Thus Section 61-b was enacted without the legislative or gubernatorial investigation into the facts that has so often led the Supreme Court of the United States to sustain statutes as a presumptively reasonable exercise of legislative power."

Reference is also made to the leading article in Columbia Law Review, Vol. 47, Jan. 1947, No. 1, entitled "New Aspects of Stockholders' Derivative Suits" by George T. Hornstein, in which it is said, on page 2 thereof:

"State legislation has been largely influenced by 'special interests'. In New York, for example, a powerful body, among whom were individuals actu-

> ally defendants in pending cases charging them with corporate wrongs, found it relatively easy to procure state laws 'killing off' stockholders' suits—heretofore the most effective, albeit inadequate, method of keeping directors in line. This group rushed through the New York Legislature an amendment to the General Corporation Law, a new Subdivision b to Section 61, and persuaded the Governor to sign it without a public hearing and despite the criticism of many bar associations. The present writer immediately recognized the legislation as 'the death knell of stockholders' derivative suits in New York', unless relief should come from either the state courts holding the legislation unconstitutional or the federal courts ruling that the legislation is procedural and therefore not binding upon them."

See also Hornstein Rights of Stockholders in the New York Courts, Yale Law Journal, Vol. 56, No. 6.

The impact of such statutes upon the public interest is more clearly demonstrated by the far-reaching effect of such statutes. In the above quoted article, 54 Yale Law Journal, 352, at page 367 the author states:

> "Does Section 61-b concern only the 'strike suit' plaintiff or will any substantial number of stockholders in American corporations be affected by its terms? The simple answer to this fundamental question appears to be that the act will unquestionably affect the rights of an overwhelming majority of stockholders who seek to maintain derivative suits in New York."

After analyzing a study prepared for the Temporary National Economic Committee by the Securities & Exchange Commission, showing the distribution of shareholdings in 1710 corporations with securities listed on a

national exchange, he draws the following well-founded conclusion at page 368:

> "These facts, therefore, seem to establish that Section 61-b, in so far as it requires the plaintiff-stockholder's shares to have a market value of $50,000 or more before he can maintain a derivative action, will operate as a practical matter to deprive an estimated 96% of all shareholders in American corporations of their right to maintain derivative actions in New York. It may even take this right from as many as 98% of the shareholders since it seems likely that of the 4% of shareholdings valued in excess of $10,000, not more than half have a value in excess of $50,000. It should be evident from these figures that only the smallest minority of shareholders will be able to meet the requirement of Section 61-b that the plaintiff's shareholdings have a value of $50,000 or more."

It might be added as a corollary to the above statement that, of the possible 2 to 4% of American stockholders who could qualify to bring a derivative stockholder's action, undoubtedly the great bulk of such shareholders would be found, by reason of their larger holdings, to be connected with the management of the corporation as officers or directors.

Since the statute applies, by its terms, not only to domestic New York corporations, but also to foreign corporations, it can readily be seen that the statute of the State of New York, which state is the world center of commercial and corporate activity, must have an effect upon countless corporations and shareholders thereof not domiciled in New York State. However, even this does not represent the full significance of this legislation upon the public interest and public economy.

Substantially similar legislation has been enacted in a number of other states. See Stockholders' Derivative Suits, 47 Col. Law Rev., page 1, at page 7 (footnote 36).

Among the states which have aped this drastic legislation, and in fact in some cases have gone even further, are the states of New Jersey, Delaware, Pennsylvania, Maryland and Wisconsin. It is significant to note that most of the states following this course are those which compete for the revenues obtainable from corporate franchises. It is well-known that some states have sought to attract corporations by inducements contained in liberal corporation laws, particularly in so far as such laws regulate management. In order to retain preeminence, the competing states have already indicated their willingness to go even further than the New York statute in imposing barriers to judicial scrutiny of the acts of management. See 47 Col. Law Review 1, at page 10, where the author states:

> "Following promptly in the wake of the original New York legislation, a number of other states, notably Delaware, New Jersey and Wisconsin, adopted legislation similar to Section 27-a (contractual only and without any provision for judicial supervision). A unique law passed the Kentucky legislature: it provide for repaying to the director not only his expenses, but 'any amount paid in compromise.' Can one imagine a more warped conception of fiduciary responsibility?"

If such legislative statutes not only remain unimpeached but follow the inevitable tendency of reproduction by other state legislatures, it is clear that the rights of stockholders formerly enforced through the courts can only be preserved by the setting up of some new tremendous arm of the federal executive branch. It will be conceded that, with all the burdens of supervision and control already placed upon the Securities & Exchange Commission, the further obligation of detailed supervision of all acts of corporate management would not only be impossible for that body to handle, but undesirable for several reasons. Among these reasons may be mentioned the cost of such administrative program, the natural aversion to further

federal control of state matters, and the antipathy toward substitution of administrative process for the traditional method of settling private, civil grievances through the courts established for such purposes.

A further important reason for prompt determination of the questions here involved by this Court is the confused status of decisions of the federal judges interpreting this and similar state statutes; for example, in *Boyd* v. *Bell*, 64 F. Supp. 22, the late Judge Bright, in refusing to apply Section 61-b, held that the statute was procedural and could not affect the federal courts' right to proceed with the same. He similarly denied, without opinion, a motion made under 61-b in *Thompson* v. *Broadfoot* (*The Aspinook Corporation*), 165 F. 2d 744.

In *Craftsman Finance & Mortgage Co.* v. *Brown*, 64 F. Supp. 168, Judge Leibell denied the application made under 61-b, apparently being of the opinion that its application in the federal court was unnecessary and undesirable.

In the instant case Judge Inch was of the opinion that the statute compelled him to exercise the judicial discretion of the federal judge (R. 8).

In *Cohen* v. *Beneficial Industrial Loan Corporation*, 7 Fed. Rules Decisions 353, Judge Smith, in the New Jersey District Court, held under a similar New Jersey statute, that the statute was remedial in its nature and not substantive and, therefore, not to be enforced by the federal court.

This is indeed but the beginning of the confusion and chaos which may be expected throughout the federal district court system in the interpretation and construction of the provisions of this statute, as well as similar statutes of other states. A decision by this Court will be the only means of eliminating such confusion and establishing consistency and uniformity in the treatment of such questions by the federal courts.

In fact, the Advisory Committee on the Rules for Civil Procedure has emphatically pointed out the need for a determination by this Court of the problem raised by the New York Statute. In its Report of Proposed Amendments of Rules of Civil Procedure for the District Courts of the United States, 5 Federal Rules Decisions 433, submitted to this Court under date of June 1946, the Advisory Committee expressed its opinion that the problem should be disposed of by judicial decision of this Court in a litigated case, rather than by "ex parte" amendment of existing Rule 23 of the Federal Rules of Civil Procedure. This Report stated at page 451 of F. R. D.:

> "As to actions instituted after the effective date of the legislation, the constitutionality of Sec. 61-b is in dispute. See *Wolf* v. *Atkinson* (Sup. Ct. 182 Misc. 675 (Constitutional)); *Citron* v. *Mangel Stores Corp.*, Sup. Ct. 50 N. Y. Supp. 2d 416 (unconstitutional); Zlinkoff: The American Investor and the Constitutionality of Sec. 61-b of the New York General Corporation Law, 54 Yale L. J. 352.
>
> * * * *
>
> The decisions here discussed show that the question is a debatable one, that there is respectable authority for either view, with a recent trend toward the view that Rule 23(b) (1) is procedural. There is reason to say that the question is one which should not be decided by the Supreme Court ex parte but left to await a judicial decision in a litigated case, and that in the light of the material in this note, the only inference to be drawn from a failure to amend Rule 23(b) would be that the question is postponed to await a litigated case.
>
> The Advisory Committee is unanimously of the opinion that this course should be followed."

The New York statute, Section 61-b General Corporation Law, would, even in the state courts be wholly in-

effective if other sections of the same law following it, did not authorize the court, after trial, to allow expenses, including counsel fees, to successful defendants (payable out of the security supplied by the plaintiff). But such allowance after a trial in a federal district court seems to be contrary to the federal statute. 28 U. S. C. Section 571 reads in its first sentence:

> "The following fees and no others shall be taxed and allowed to attorneys, solicitors and proctors in the courts of the United States and to district attorneys except in cases otherwise expressly provided by law."

The fees allowed are listed in the next Section 572, being limited mainly to relatively small docket fees.

There would seem to be no doubt of the power of Congress to enact said Sections 571 and 572. How then can the New York section, 61-b, be enforced in any case in a federal court to the abrogation of said valid federal statutes?

POINT V.

It is respectfully requested that this Court, in due course, finally determine this question and dispose of this controversy by reversing the failure of the Circuit Court of Appeals to hear the appeal and reversing and setting aside the order of the District Court as being without authority in law.

An almost exact precedent for the action of this Court requested by the petitioner, is found in the case of *In the Matter of 620 Church Street Building Corp.*, 299 U. S. 24, in which the following circumstances appeared: At a time when permission to appeal was required application was made to the Circuit Court of Appeals in a proceeding under Section 77B of the Bankruptcy Act, following a con-

firmation by the District Court of the plan of reorganization. The Circuit Court of Appeals denied leave to appeal. This Court determined specifically that the action of the Circuit Court of Appeals in declining jurisdiction could

> "properly be reviewed upon a writ of certiorari under the general power conferred by Judicial Code, §262, 28 U. S. C. 377. That provision contemplates the employment of this writ in instances not covered by §240 of the Judicial Code (28 U. S. C. 347) and affords ample authority for using the writ as an auxiliary process and as a means 'of giving full force and effect to existing appellate authority and of furthering justice in other kindred ways'. Citing cases *United States* v. *Beatty*, 232 U. S. 463, 467; *American Construction Co.* v. *Jacksonville, T. & K. W. Ry. Co.*, 148 U. S. 372, 379, 380; *In re Chetwood*, 165 U. S. 443, 461, 462; *Magnum Import Co.* v. *Coty*, 262 U. S. 159, 162."

Although this Court found that the Circuit Court of Appeals did not in that instance abuse its discretion in declining to allow an appeal, this Court examined the entire question and reached the conclusion that there was no substance to petitioner's claim which was barred by findings of fact which were conclusive on the Circuit Court of Appeals.

In the case at bar the primary question involved is concerned with the enforcement in the federal court of a state statute imposing an arbitrary qualification on the otherwise free right in the federal court to institute and carry forward an equity action for relief.

It is, therefore, requested that this Court shall finally dispose of the immediate controversy by holding that the order of the District Court based on the state statute is without validity and must be set aside.

See also:

United States Alkali Export Association, Inc. v. *United States*, 325 U. S. 196;
DeBeers Consolidated Mines, Inc. v. *United States*, 325 U. S. 212.

CONCLUSION.

A writ of certiorari as prayed for in the Petition should issue.

Respectfully submitted,

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APPENDIX.

State Statutes.

The state statute is Section 61-b of the New York General Corporation Law, being Section 61-b, Article 6, of Chapter 23 of the Consolidated Laws of New York, added by Chapter 668 of the Laws of 1944 and amended by Chapter 869 of the Laws of 1945 (22 McKinney's Consolidated Laws of New New York, Annotated, Sec. 61-b). The statute here cited is as follows:

> "In any action instituted or maintained in the right of any foreign or domestic corporation by the holder or holders of less than five per centum of the outstanding shares of any class of such corporation's stock or voting trust certificates, unless the shares or voting trust certificates held by such holder or holders have a market value in excess of fifty thousand dollars, the corporation in whose right such action is brought shall be entitled at any stage of the proceedings before final judgment to require the plaintiff or plaintiffs to give security for the reasonable expenses, including attorney's fees, which may be incurred by it in connection with such action and by the other parties defendant in connection therewith for which it may become subject pursuant to section sixty-four of this chapter, to which the corporation shall have recourse in such amount as the court having jurisdiction shall determine upon the termination of such action. The amount of such security may thereafter from time to time be increased or decreased in the discretion of the court having jurisdiction of such action upon showing that the security provided has or may become inadequate or is excessive."

The statute above quoted refers to "section sixty-four of this chapter". That reference is to Section 64 of the New York General Corporation Law, being Section 64,

Article 6-A, of Chapter 23 of the Consolidated Laws of New York, added by Chapter 869 of the Laws of 1945 and derived in part from former Section 61-a of the said General Corporation Law (22 McKinney's Consolidated Laws of New York, Annotated, Sec. 64). The statute here cited is as follows:

> "Any person made a party to any action, suit or proceeding by reason of the fact that he, his testator or intestate, is or was a director, officer or employee of a corporation shall be entitled to have his reasonable expenses, including attorneys' fees, actually and necessarily incurred by him in connection with the defense of such action, suit or proceeding, and in connection with any appeal therein, assessed against the corporation or against another corporation at the request of which he served as such director, officer or employee, upon court order, in the manner and to the extent provided by sections sixty-five, sixty-six and sixty-seven of this chapter, and in the instances specified in section sixty-eight of this chapter, except in relation to matters as to which it shall be adjudged in such action, suit or proceeding that such officer, director or employee is liable for negligence or misconduct in the performance of his duties."

The statute above quoted refers to "section sixty-five, sixty-six and sixty-seven of this chapter" and to "section sixty-eight of this chapter". Those references are to Sections 65-68, both inclusive, of the New York General Corporation Law, being Sections 65-68, both inclusive, Article 6-A, Chapter 23 of the Consolidated Laws of New York, all added by Chapter 869 of the Laws of 1945, Sections 65-67, being derived in part from former Section 61-a of the said General Corporation Law (22 McKinney's Consolidated Laws of New York, Annotated, Secs. 65-68). The statutes here cited are as follows:

> "65. Application for payment of expenses under

the provisions of a certificate of incorporation, or other certificate filed pursuant to law, by-law or resolution, or for assessment of expenses pursuant to section sixty-four of this chapter, may be made either (a) in the action, suit, or proceeding brought in this state in which such expenses were incurred or (b) to the supreme court in a separate proceeding. Such application shall show the disposition of any previous application made to any court. If not made in the action, suit or proceeding in which the expenses were incurred, such application shall also show reasonable cause for failure to make application in such action, suit or proceeding.

"66. An application pursuant to section sixty-five of this chapter shall be made in such manner and form as may be required by applicable rules of court or in the absence thereof by direction of the court to which it is made. Such application shall be upon notice to the corporation. The court may also direct that notice be given at the expense of the corporation to such other persons as it may designate in such manner as it may require.

"67. If after hearing an application for payment or for assessment of expenses, the court shall find that the applicant, his testator or intestate was successful in whole or in part, or that the action against him has been settled with the approval of the court, the court shall grant such application in such amount as it shall find to be reasonable, and shall make an order directing the corporation to pay to the applicant the amount awarded; provided, however, that no award of indemnity or assessment of expenses shall be made in any case where it shall appear (i) that the law of the state of incorporation of the corporation prohibits such indemnity or assessment; or (ii) that the award would be inconsistent with any action of the stockholders or members of the cor-

poration taken prior to and in effect at the time of the accrual of the alleged cause of action; or (iii) if there has been a settlement approved by the court, that the award would be inconsistent with any condition with respect to payment of indemnity or assessment of expenses expressly imposed by the court in approving such settlement.

"68. Sections sixty-four, sixty-five, sixty-six and sixty-seven of this chapter shall apply to an application made to a court in this state in any of the following cases:

"(a) when the corporation against whom the application is made for assessment of expenses pursuant to section sixty-four or for payment of expenses under the provisions of a certificate of incorporation, or other certificate filed pursuant to law, by-law or resolution, is a domestic corporation or a corporation doing business in this state;

"(b) when such expenses were incurred in an action or proceeding maintained in a court in this state;

"(c) when the application is made by a resident of this state and the director, officer or employee was a resident of this state at the time of the accrual of the alleged cause of action asserted in the litigation in which such expenses were incurred."

Section 61-a of the New York General Corporation Law hereinabove referred to was repealed by Chapter 869 of the Laws of 1945.

Other state statutes referred to in this brief are Sections 20 and 21 of the Stock Corporation Law of New York (28 McKinney's Consolidated Laws). The statutes here cited are as follows:

"§20. Voluntary sale of franchise and property and rights of objecting stockholders.

A stock corporation, except a railroad corporation

and except as otherwise provided by law, with the consent of the holders of record of two-thirds of its outstanding shares entitled to vote thereon may sell and convey its property, rights, privileges and franchises, or any interest therein or any part thereof; but franchises within the state may be sold only to a domestic corporation. Before such sale or conveyance shall be made such consent shall be obtained at a meeting of the stockholders called pursuant to section forty-five. Any stockholder not voting in favor of such proposed sale and conveyance may at any time prior to the vote thereon—or if notice of the meeting was not mailed to him at least twenty days prior to the taking of such vote, then within twenty days after the mailing of such notice—object to such sale and conveyance and demand payment for his stock, and thereupon such stockholder or the corporation shall have the right, subject to the conditions and provisions of section twenty-one, to have such stock appraised and paid for as provided in said section. Such objection and demand must be in writing and filed with the corporation. As amended L. 1934, c. 764, §2, eff. May 19, 1934.

§21. Determination of value of stock of objecting stockholder.

In the event that the stockholders of a corporation have taken action pursuant to sections fourteen, twenty, thirty-six, eighty-five, eighty-six or ninety-one and if any stockholder has objected to such action and demanded payment for his stock as provided in section fourteen, section twenty, subdivision nine of section thirty-eight, subdivision seven of section eighty-five, section eighty-seven or section ninety-one, either such stockholder or the corporation may apply upon eight days' notice to the other, within sixty days after such demand, to the supreme court

at any special term thereof held in the judicial district in which the office of such corporation is situated, for the appointment of three persons to appraise the value of such stock, and the court shall appoint three such appraisers and designate the time and place of their first meeting, with such directions in regard to their proceedings as shall be deemed proper. The court may at the time of appointing the appraisers or at any subsequent time direct such stockholder to submit his stock certificate to the clerk of the court for notation thereon of the pendency of the appraisal proceedings, and if such stockholder fails to comply with such direction the court may on motion of the corporation dismiss the proceeding. The court may fill any vacancy in the board of appraisers occurring by refusal or neglect to serve or otherwise. The appraisers shall meet at the time and place designated, and after being duly sworn honestly and faithfully to discharge their duties, they or any two of them shall estimate and certify the value of such stock just prior to the taking of the action to which the objection is made and deliver one copy of their appraisal to such corporation, and another to such stockholder if demanded by him. Either the stockholder or the corporation may apply to the supreme court upon five days' notice for an order confirming or modifying or rejecting the appraisal. If the court confirms or modifies such appraisal it shall award interest on the value of such stock, as determined by such appraisal and as confirmed or modified by the court, from the date of taking the action to which the objection was made, and shall direct the manner in which payment shall be made to such stockholder. Before receiving payment such stockholder shall surrender to the corporation his certificate of stock. When the corporation shall have paid the amount of such appraisal, as directed by the court, such stock-

holder shall cease to have any interest in such stock and in the corporate property of such corporation and such stock may be held or disposed of by such corporation. The fees and expenses of the appraisers shall be fixed by the court and paid by the corporation. As amended L. 1924, c. 441, §6; L. 1934 c. 764, §3, L. 1936, c. 213 §1; L. 1936 c. 778, §4; L. 1939 c. 183 eff. April 1, 1939."

Federal Statutes.

A pertinent federal statute is the Enabling Act of 1934 authorizing the promulgation of Federal Rules of Civil Procedure (48 Stat. 1064, 28 U. S. C., Sec. 723-b), which is, in part, as follows:

> "The Supreme Court of the United States shall have power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant."

Federal Constitutional Provisions.

The following provisions of the Constitution of the United States are or may be pertinent:

> *Article III, Section 1.* "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. * * *"
>
> Section 2. "The judicial power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties

made * * * under their authority, * * * to controversies * * * between citizens of different states * * *."

"Amendment V. No person shall be * * * deprived of life, liberty or property without due process of law;"

"Amendment XIV—Section 1. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

New York State Constitutional Provisions.

The following provisions of the Constitution of the State of New York are or may be pertinent:

Article I—Section 6: "No person shall be deprived of life, liberty or property without due process of law."

Article I—Section 11: "No persons shall be denied the equal protection of the laws of this state or any subdivision thereof."